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10 BOSTON PRIVATE BANK & TRUST COMPANY

11 UNITED STATES BANKRUPTCY COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

15 In re:
16 272 E. Santa Clara Grocery, LLC,
17 Debtor.

CASE NO. 13-53491
RS No.
CHAPTER NO. 11

**SECURED CREDITOR BOSTON
PRIVATE BANK & TRUST COMPANY'S
REPLY TO DEBTOR'S OPPOSITION TO
MOTION FOR ORDER CONFIRMING NO
STAY IS IN EFFECT WITH RESPECT TO
RENT**

Hearing
Date: August 21, 2013
Time: 2:00 p.m.
Place: 280 S. First Street
 San Jose, CA
 Courtroom 3099
Judge: Hon. Stephen L. Johnson

I.

INTRODUCTION

3 Debtor, 272 E. Santa Clara Grocery, LLC (“Debtor”), misses the mark with its opposition
4 (“Opposition”) to this motion. Focusing its argument on how an assignment of rents creates a
5 security interest and the consequences (or lack thereof) of denoting such an assignment as
6 “absolute,” Debtor entirely misses (or ignores) the statutory transformation of that security
7 interest into an absolute right to collect rents once the requisite notice is provided. Specifically,
8 the Opposition says nothing about the mandate under California Civil Code Section 2938 that
9 once the steps are taken to enforce an assignment of rents, the tenant is “obligated” to pay the
10 assignee, and the assignee “shall be entitled” to receive the rents. The Opposition also does not
11 contest Boston Private Bank & Trust Company’s (“BPB”) pre-petition enforcement of its rights
12 under the Assignment of Rents at issue. It is therefore undisputed that the mandates of Civil
13 Code Section 2938 apply to obligate the tenant at 272 East Santa Clara Street to send its rent
14 payments to BPB. Consequently, the rents at issue are not property of the estate or subject to the
15 Automatic Stay of Section 362, and this motion should be granted.

16 Most of the lengthy “Factual Background” in Debtor’s Opposition is irrelevant for
17 purposes of this motion. The effort to disparage BPB, albeit unfounded and wrong, has no
18 bearing here. The purported facts are also unsupported by any declaration or affidavit which
19 complies with Local Rule 9013-1.¹ The assertions should therefore be ignored. More
20 importantly, it appears that Debtor does not dispute the relevant underlying facts set forth in
21 BPB’s moving papers. Consequently, there is no need to and BPB will not address the errors in

¹ In pertinent part, Local Rule 9013-1 provides:

“(d) Affidavits or Declarations.

(1) Factual contentions made in support of or in opposition to any motion, application or objection should be supported by affidavits or declarations and appropriate references to the record. Extracts from depositions, interrogatory answers, requests for admission and other evidentiary matter must be appropriately authenticated by affidavit or declaration.

(2) *Affidavits and declarations shall contain only facts, shall conform as far as possible to the requirements of Fed. R. Civ. P. 56(e), and shall avoid conclusions and argument. Any statement made upon information or belief shall specify the basis therefor. Affidavits and declarations not in compliance with this rule may be stricken in whole or in part.*" (Emphasis supplied)

1 the Debtor's "Factual Background."

2 **II.**

3 **ARGUMENT**

4 **A. Debtor's Opposition Ignores The Express Language Of California Civil Code
5 §2938 That Creates An Assignee's Absolute Right To Collect Rents**

6 Debtor's Opposition asserts that this court should follow the decision of Judge
7 Jaroslovsky in *In re Superior Acquisitions, Inc.* (Opposition, at 8:18-9:14.) But, the brief
8 decision in *In re Superior Acquisitions*, like Debtor's Opposition, is silent with respect to key
9 language in California Civil Code Section 2938 ("Section 2938"). There is no attempt to analyze
10 and reconcile the express provisions of Section 2938 that dictate the effects of an assignment of
11 rents once the assignee has exercised its statutory rights to collect rents.

12 Specifically, as pointed out in the moving papers, but ignored in the Opposition, Section
13 2938 dictates that once the assignor defaults and the assignee complies with the statutory steps to
14 enforce its assignment rights (e.g., provides notice directing the tenant to pay rents to the
15 assignee): "**Assignee shall be entitled** to receive all rents, issues and profits that accrue on or
16 after that date." Section 2938(c). [Emphasis added.] Further, the tenant "**shall be obligated** to
17 pay to the assignee all rents, issues and profits that are past due and payable[.]" Section 2938(d).
18 [Emphasis added.] Moreover, Section 2938(d) dictates that if the tenant pays the assignor after
19 receipt of a proper demand from the assignee, "**the tenant shall not be discharged of the**
20 **obligation to pay rent to the assignee....**" [Emphasis added.] The effect of this language is that
21 once an assignment of rents is triggered under Section 2938, a tenant's rent payments no longer
22 belong to the assignor. Debtor does not dispute either the default or BPB's timely and proper,
23 pre-petition exercise of its rights under Section 2938 to compel Grocery Outlet, Inc. to make its
24 rent payments to BPB.

25 Although Debtor attempts to distinguish the *In re Petit* case, its effort is ineffective.
26 Notwithstanding the Debtor's suggestion, BPB does not rely on *In re Petit* based upon a parallel
27 fact pattern. Instead, the significance of that case is its analysis of the same issue confronting the
28 parties and court now: what constitutes "property of the estate." *In re Petit* teaches that the

1 indicia of property which is **excluded** from the bankruptcy estate include property where the
2 Debtor lacks “rights we associate with legal or equitable ownership: they could not possess the
3 funds, use the funds, sell the funds, loan the funds, give away the funds, encumber the funds, or
4 exclude others from using the funds.” *In re Petit*, 217 F. 3d 1072, 1077 (9th Cir. 2000). The
5 mandates of Section 2938 quoted above, and overlooked by Judge Jaroslovsky and ignored by the
6 Debtor, mirror the analysis in *In re Petit*. Consequently, Judge Jaroslovsky’s decision is not only
7 not binding on this court, but it should not be followed. Instead, the plain language of Section
8 2938 should be followed, making the rent at issue outside of Debtor’s estate and not subject to the
9 Automatic Stay.

10 **B. Debtor Is Wrong To Suggest That Bankruptcy Code Section 541(a)(6) Is
11 Dispositive To Determine Whether Rents Are Property Of The Estate**

12 Albeit with little emphasis, Debtor suggests that the court should follow *In Re
13 Amaravanti Limited Partnership*, 416 B.R. 618 (Bankr. S.D. Tex 2009), to conclude that 11
14 U.S.C. §541(a)(6) (“Section 541(a)(6)”) establishes that rents are property of the estate so that
15 consideration of Section 2938 is unnecessary. (Debtor’s Opposition, at 10:15-27.) *In re
16 Amaravanti* is a Fifth Circuit bankruptcy court case and is not binding on this court. Counsel for
17 BPB searched and could not locate any Ninth Circuit decision applying the *Amaravanti* analysis.
18 Presumably, Debtor’s counsel likewise could find no such authority because none is cited in the
19 Opposition. Even Judge Jaroslovsky’s opinion in *In re Superior Acquisitions, Inc.* does not
20 attempt such an application of Section 541(a)(6).

21 *In re Amaravanti* should not be followed for several reasons. First, it flies in the face of
22 the fundamental principal that bankruptcy law does not expand a debtor’s property rights beyond
23 those that exist under state law. *See, e.g., Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815,
24 819 (9th Cir. 1997) (filing for bankruptcy cannot give debtor a greater interest in assets than that
25 which he owned before bankruptcy); and, *In re Coupon Clearing Service, Inc.*, 113 F. 3d 1091,
26 1099 (9th Cir. 1997) (state law determines the nature and extent of a debtor’s interest in property,
27 and the estate can have no greater rights than those held by the debtor prior to bankruptcy).

28 Second, the analysis in *In re Amaravanti* contradicts the equally elementary principal

1 that the plain meaning of legislation should be followed, unless doing so would contradict the
2 intentions of its drafters. *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). The drafters'
3 intention controls. *Id. at* 242. With respect to Bankruptcy Code Section 541, the reports of both
4 the House of Representatives and Senate reveal that Congress intended not to expand a debtor's
5 rights beyond those that exist at state law. *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th
6 Cir. 1984) (quoting House Report. H.R. Rep. No. 595, 95th Cong., 1st Sess., *reprinted in* 1978
7 U.S. Code Cong. & Ad. News 5787); *In re Vote*, 276 F.3d 1024, 1026 (8th Cir. 2002) (quoting
8 Senate Report, S. Rep. No. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868).

9 Third, contrary to the assertion in *In re Amaravanti*, the language of Section 541(a)(6)
10 shows that Congress did not intend for it to preempt state law property rights. When Congress
11 intends to preempt state nonbankruptcy law, it uses the phrase "notwithstanding any other
12 applicable nonbankruptcy law" or similar language, which appears in other Bankruptcy Code
13 provisions, such as Sections 1123(a), 541(c)(1), 728(b) and 363(l). *Integrated Solutions Inc. v.*
14 *Service Support Specialties Inc.*, 124 F.3d 487, 493 (3d Cir. 1997). No such language appears in
15 the text of Section 541(a)(6). Section 541(c)(1), for example, includes the phrases "becomes
16 property of the estate ... notwithstanding any provision ... in ... applicable nonbankruptcy law."
17 The distinction between this language in Section 541(c)(1) and the language of Section 541(a)(6),
18 which omits any similar language, shows that Congress chose not to preempt state law pertaining
19 to pre-petition assignments of rent.

20 Accordingly, it would be improper to follow *In re Amaravanti*. Considering specifically
21 California Civil Code Section 2938 and its provisions described above, applying the analysis of *In*
22 *re Amaravanti* would violate fundamental bankruptcy principals and would contradict Congress'
23 express intent not to preempt state law in this arena.

24 As part of its assertions, the Debtor wrongly and disparagingly characterizes BPB's
25 receipt of rent payments to have been an "interception." (Debtor's Opposition, at 11:9-12.)
26 Debtor's tenant properly paid to BPB, and BPB passively received the post-petition rent payment
27 following and as a result of BPB's pre-petition compliance with California law. It is holding the
28 rent payment and filed this motion promptly after receipt of the rent to obtain confirmation that

1 the post-petition receipt of rents does not violate the Automatic Stay. For the reasons set forth
2 above, the rents are not property of the estate and are outside the scope of the automatic stay.
3 This motion should therefore be granted.²

4 **III.**

5 **CONCLUSION**

6 It is undisputed that, pursuant to and in compliance with California law, BPB triggered
7 both its absolute entitlement to the rent as well as the Tenant's unqualified obligation to pay the
8 rent to BPB before this case was filed. As a result, and as a matter of law, the Debtor lost its right
9 to possession, control and authority over the rent. Debtor's Opposition is silent on that provision
10 and consequence of California law. The effect of it, however, is that the Tenant's rent payments
11 are not property of the Debtor's estate and the automatic stay does not apply to them. BPB,
12 therefore, is entitled to retain the July rent it received and all subsequent rents from the Tenant.

13 This motion should be granted accordingly.

14 Dated: August 14, 2013

HOPKINS & CARLEY
A Law Corporation

16 By: /s/ Stephen J. Kottmeier

17 Stephen J. Kottmeier

18 Jay M. Ross

19 Attorneys for Secured Creditor
BOSTON PRIVATE BANK & TRUST
COMPANY

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26 _____
27 ² Debtor's Opposition also includes what it characterizes to be a "cross-motion" to request permission to use cash
28 collateral. BPB is not aware of any procedural rule that authorizes the inclusion of such a "cross-motion" as part
of opposition to this motion. Debtor's cross-motion should be rejected on this basis alone. Nonetheless,
concurrently herewith BPB files a separate opposition to that motion.